United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

846

No. 14,080

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 8 1958
Joseph W. Stewart
CLERK

CHARLES BERRY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert L. Tribl, Printer

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

846

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 8 1958
Joseph W. Stewart
CLERK

No. 14,080

CHARLES BERRY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.

INDEX

	Record Page	Appendix Page
Indictment	211	1
Verdict	215	3
Motion for Judgment of Acquittal, N.O.V.	216	4
Defendant's Motion for a Judgment of Acquittal N.O.V., is by the Court Overruled	217	5
Judgment and Commitment	218	5
Notice of Appeal	219	6
Excerpts from Transcript of Proceedings	1	7
Witnesses:		
Joseph Levine		
Direct	16	7
Cross	34	14
John Joseph Gannon		
Direct	73	17
Fred T. Dick		
Direct	89	20
James L. Young		
Direct	108	21
Charles Berry		
Direct	132	25
Cross	135	27
Argument by Counsel for the Government	156	29
Court's Charge to the Jury	184	32
Verdict of the Jury	208	46

JOINT APPENDIX

[Filed January 28, 1957]

211 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 27, 1956, Sworn in on January 2, 1957

The United States of America	:	Crim. No. 76-57
v.	:	Grand Jury No. Orig.
Ernest E. Harding Charles H. Berry	: :	Vio. 26 U. S. C. 4704a, 4705a 21 U. S. C. 174

The Grand Jury charges:

On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Joseph Levine, as provided by law.

SECOND COUNT:

On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry facilitated the concealment and sale of a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and milk

212 sugar, after the said heroin hydrochloride had been imported, with the knowledge of Ernest E. Harding and Charles H. Berry, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

FOURTH COUNT:

On or about August 30, 1956, within the District of Columbia, Ernest H. Harding did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, not in pursuance of a written order, written for that purpose, from the said Ernest E. Harding, as provided by law.

FIFTH COUNT:

On or about August 30, 1956, within the District of Columbia, Ernest E. Harding purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

SIXTH COUNT:

On or about August 30, 1956, within the District of Columbia, Ernest E. Harding facilitated the concealment and sale of a narcotic drug, that is, eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after the said heroin hydrochloride had been imported, with the knowledge of Ernest E. Harding, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fourth and fifth counts of this indictment.

213 SEVENTH COUNT:

On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride,

quinine hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Ernest E. Harding and Charles H. Berry, as provided by law.

EIGHTH COUNT:

On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is,seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride, quinine hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the seventh count of this indictment.

NINTH COUNT:

On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry facilitated the concealment and sale of a narcotic drug, that is, seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride, quinine hydrochloride and mannitol, after the said heroin hydrochlodide had been imported, with the knowledge of Ernest E. Harding and Charles H. Berry, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the seventh and eighth counts of this indictment.

/s/ Oliver Gasch
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

/s/ Daniel L. Harbour
Foreman.

---

215 [Filed May 8, 1957]

On this 8th day of May, 1957, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury upon their oath say that the defendant Ernest Harding is Not Guilty on counts one, two, and three; Guilty on counts four, five, six, seven,

eight, and nine; and that the defendant Charles H. Berry is Not Guilty on counts one, two, and three; Guilty on counts seven, eight, and nine.

Each defendant is referred to the Probation Officer of the Court, and each defendant is remanded to the District of Columbia Jail.

By direction of

Charles F. McLaughlin
Presiding Judge
Criminal Court #Two

---

216 [Filed May 13, 1957]

MOTION FOR JUDGMENT OF ACQUITTAL N. O. V.

Comes now the defendant by his attorney and respectfully moves this Honorable Court to grant a judgment of acquittal non obstante verdicto as to the defendant Charles Berry on counts seven through nine.

For reason he urges on the Court the same reasons given in the motion for acquittal during the trial; that is, that there was no evidence of Berry's participating in any way in the procuring of the thirty capsules allegedly passed to the informer by his co-defendant, Harding. The evidence in the case not only indicated that Berry did not participate, but there is also the factor that Harding was convicted for selling capsules the night before, obtained from the same course, when Berry was clearly nowhere in the vicinity.

WHEREFORE, it is respectfully urged that the Court grant a motion for a judgment of acquittal as to Berry.

/s/ Jean F. Dwyer
* * * * *
Attorney for Defendants

---

217 [Filed June 7, 1957]

On this 7th day of June, 1957, came the attorney of the United States; the defendant in proper person and by his attorney, Jean F. Dwyer, Esquire; whereupon the defendant's motion for a judgment of acquittal N.O.V., coming on to be heard, after argument by counsel, is by the Court overruled.

The defendant is remanded to the District of Columbia Jail.

By direction of

Charles F. McLaughlin
Presiding Judge
Criminal Court #Two

---

218 [Filed June 21, 1957]

JUDGMENT AND COMMITMENT

On this 20th day of June, 1957, came the attorney for the government and the defendant appeared in person and by counsel Jean F. Dwyer.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of Violation of Section 4704a, Title 26, of the U.S. Code; Violation of Section 4705a, Title 26, of the U.S. Code; Violation of Section 174, Title 21 of the U.S. Code, as charged in counts 7, 8, and 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified

officer and that the copy serve as the commitment of the defendant.

/s/ Charles F. McLaughlin
United States District Judge

---

219 [Filed July 29, 1957]

NOTICE OF APPEAL

Name and address of appellant: Charles Berry
District of Columbia Jail
200 19th St. S. E.
Washington, D. C.

Name and address of appellant's attorney:

Robert Ackerly (Appointed)
1625 K Street, N. W.
Washington, D. C.

Offense: Vio. Title 26, U. S. Code 4704a, 4705a, T. 21, U. S. C. 174

Concise statement of judgment or order, giving date, and any sentence:

Sentenced to imprisonment for a period of five (5) years June 20, 1957, CHARLES F. McLAUGHLIN, Judge.

Name of institution where now confined, if not on bail:

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

July 29, 1957
Date

Charles H. Berry
Appellant

Attorney for Appellant

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.

May 7, 1957

The above-entitled cause came on for hearing before the HONORABLE CHARLES F. McLAUGHLIN, United States District Judge, at 10:00 a. m.

APPEARANCES:

ARTHUR McLAUGHLIN,
Assistant United States Attorney,
Counsel for the Government

JEAN F. DWYER,
Counsel for the Defendants

* * *

16 JOSEPH LEVINE

* * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

* * * *

Q. Now, recalling your attention to August 29 of 1956, where did you live on that date of August 29, 1956? A. 134 South Carolina Street, Baltimore 2, Maryland.

Q. Now, on August 29 of 1956, did you have an occasion to come to Washington, D. C. ? A. Yes, sir.

* * * *

17 Q. And you say you arrived in Washington about 9:00 p. m. on that date; is that right? A. That is correct.

Q. When you arrived in Washington, where did you go in Washington, D. C. A. On 11th Street, between O and P.

Q. And what is located in that immediate vicinity? A. Well, the Sugar Bowl Cafe.

Q. When you arrived in that immediate vicinity, did you go in the Sugar Bowl ?

18 What is the Sugar Bowl, a restaurant? A. I didn't go in on the night of the 29th.

Q. All right. While in that immediate vicinity, on August 29, 1956, did there come a time when you saw a man identified to you as Mr. Berry? A. Yes, I did.

Q. And where did you see Mr. Berry on August 29 of 1956? A. At my personal car.

Q. All right. Where was your car at that time? A. It was parked on the corner of P and 11th.

Q. How did you come to meet or see Mr. Berry at that time? A. I was introduced to him by Fat Man, known to me as Fat Man.

Q. Is that one of the men that came over from Baltimore with you? A. One of the men that came from Baltimore with me.

Q. After you were introduced to the Defendant Berry, did you talk to him? A. Not at the present time. The conversation went between him, Berry, Fat Man and Dicky.

Q. All right. Did there come a time later when you talked to him? A. Well, I talked to him after he finished his business with Fat Man and Dicky.

19 Q. All right. Where was he at the time that you talked to him? A. He was on 11th Street.

Q. Now, what conversation did you have with the Defendant Berry at that time? A. I wanted to see Harding.

Q. Just tell us what did you say to Berry, as near as you can recall? A. Well, as near as I can remember, I asked him about Harding, Ernest Harding.

Q. What did you ask him about Harding? What did you say to him? A. I asked him, where was Iggy.

He said, he didn't know at the present time, but he pretty sure he would show sometime during that night.

Q. And who did you mean by, Iggy? A. Ernest Harding.

Q. All right. Then what next happened after you said that to Berry? A. Well, we stayed around for a while; and shortly after midnight, Harding showed up.

Q. Harding showed up where? A. On 11th Street.

Q. And where on 11th Street in reference to the Sugar Bowl?

20 A. Just about in front of the Sugar Bowl, when he showed up.

Q. What happened when Harding showed up? A. Harding and Berry got into my car.

Q. What happened then? A. Well, I had a conversation with Harding about some drugs.

I told him I wanted to buy some horse, meaning heroin; and I asked him for the price; that I wanted to resell it in Baltimore.

He told me that if I buy as much as a dozen, or a dozen and a half, that he could let me have them --

THE COURT: When you say "he" told you --

THE WITNESS: Ernest Harding.

-- at a dollar and a half a pill.

But I told him at the time I only wanted one to see what it was like.

He stated to me that one would cost me $2.50.

I agreed to buy.

He then --

BY MR. McLAUGHLIN:

Q. When you had this conversation with him, where was the Defendant Berry? A. He was in the presence of the conversation.

Q. Where was he? A. He was in the presence -- in my car, during the time of the conversation.

21 Q. Go ahead. What else was said or done? A. Well, he directed me to drive --

Q. Who directed you? A. Harding.

Q. All right. A. -- directed me to drive to 11th Street, where I parked on 11th Street, between Euclid and Clifton; where Harding told Berry to go get him one thing, meaning one capsule of heroin.

Shortly, he returned.

Q. Who returned? A. Berry.

Q. Did Berry leave the car? A. He did leave the car.

Q. Where was Harding at the time Berry left the car? A. Sitting in the car with me.

Q. All right. Then what happened after Berry left the car? A. In about ten minutes, Berry returned; and he passed a capsule filled with white powder to Harding; and Harding passed it to me; and I paid him $2.50.

Q. You paid who the $2.50? A. Harding.

* * * *

27 BY MR. McLAUGHLIN:

Q. I will show you Government's Exhibit marked for identification No. 2 and ask you, Mr. Levine, if you can identify those? A. Yes, sir; I can identify them.

Q. You identify Government Exhibit marked for identification No. 2 as what? A. As the 18 capsules I bought from Harding.

Q. All right. Did they contain a white powder at the time that you purchased them? A. Yes, sir, they did.

Q. At the time that Government's Exhibit No. 2 was turned over to you by Harding, did it contain any Government stamps of any kind on it? A. No, sir.

Q. After you received Government's Exhibit marked for identification No. 2 from the Defendant Harding, who, in turn, did you turn them over to? A. Agent John Gannon.

Q. Now, recalling your attention to August 31 of 1956, did you have occasion to be in Washington, D.C. on that date? A. Yes, sir; I was here.

Q. All right. What time would you say you were in Washington on August 31, 1956? A. Between 8:00 and 8:30.

28 Q. That is P.M. or A.M.? A. At night.

Q. And when you arrived in Washington at that time, where did you go? A. At the Washington Field Office.

Q. When you arrived at the Washington Field Office, who did you see there? A. Agent Dick and Agent John Gannon.

Q. Did Agent Gannon or Agent Dick do anything to you or with you at that time? A. Not at the present time. We left and went to 5th and M Street, at the Women's Bureau.

Q. How did you leave? By what means of transportation did you leave? A. My personal car.

Q. And where did you go? A. Fifth and M, at the Women's Bureau.

Q. Now, did you go any place from there? A. Yes, sir. After I was searched and furnished with $45.00 of Government funds.

Q. Who furnished you with that money? A. Agent John Gannon.

Q. And after you were furnished with that money on August 31, 1956, where did you go? A. To 11th Street, between O and P.

29 Q. What time would you say you arrived in that immediate vicinity? A. I would say around 9:30, between a quarter past nine and 9:30.

Q. When you arrived in that immediate vicinity, what happened? A. Met Harding.

Q. Where did you meet Harding? A. Met Harding in the Sugar Bowl Cafe.

Q. Did you have any conversation at that time with the Defendant Harding? A. Yes, sir, I did.

Q. What talk or conversation did you have with Harding at that time? A. I told him at that particular time I wanted to make a bigger buy and could he give me a break.

He told me he couldn't do no better than a dollar and a half. Maybe next time he could maybe give me a better deal.

He asked me how many things did I want, meaning capsules.

I told him, 30.

He then got into my car, accompanied with Berry.

Q. When did Berry come upon the scene? A. Well, he was on

30 the scene all the time.

Q. When you entered the Sugar Bowl restaurant --

MR. McLAUGHLIN: Mark this 3 and 3-A.

(Whereupon Government's Exhibits Nos. 3 and 3-A were marked for identification.)

BY MR. McLAUGHLIN:

Q. When you entered the Sugar Bowl restaurant, who was the first one that you met in there? A. Harding was the one.

Q. At the time that you met Harding, where was the Defendant Berry present? A. Standing right side of him.

Q. What? A. He was standing side of Harding. They were together.

Q. This conversation that you said you had with Harding, was that in the presence of Berry? A. Yes, it was.

Q. All right. After you had the conversation with Harding, then what next happened? A. Well, they got into my car --

Q. When you say "they" got into your car -- A. Harding and Berry got into my car and directed me --

Q. All right. After they got into your car, then what happened?

31 A. Harding directed me to drive to 12th and T, where I parked on the corner.

Q. When you parked on the corner of 12th and T Street, what happened then? A. Well, Harding and Berry start out of the car. I told them that I didn't want to sit there by myself. Berry remained in the car with me while Harding went around the corner out of my sight.

Approximately ten to fifteen minutes, Harding return; give me a small package filled with capsules with white powder.

I counted them and found that there to be 30. I then give Harding $45. 00; and we then --

Q. What? A. -- we then left. They got out of the car at 11th and Rhode Island. I met at 5th and Rhode Island with the Agents.

Q. Now, at that time, or any time that evening, did you give the Defendant Berry or the Defendant Harding any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics?

A. No, sir.

Q. I will show you Government's Exhibit marked for identification No. 3, and ask you, Mr. Levine, if you can identify those?

32 A. Yes, sir, I can.

Q. You identify Government's Exhibit marked for identification No. 3 as what? A. As being the 30 capsules of heroin I received from Harding.

Q. Did they contain a white powder at the time you received them from Harding? A. Yes, they did.

Q. Did they have any Government stamps of any kind at all on them at that time? A. No, sir.

Q. After you received Government's Exhibit marked for identification No. 3 from the Defendant Harding, to whom, in turn, did you turn them over? A. Agent John Gannon.

Q. Now, all that you have testified to, that is, that happened on August 29 of 1956, August 30 of 1956 and August 31 of 1956, would you say happened in the District of Columbia? A. Yes, sir, it did.

Q. Now, on August 29 of 1956, when you say you met the Defendant Berry, had you known the Defendant Harding prior to that time? A. No, sir.

Q. On August 29 of 1956, did anyone introduce you to Harding?

33 A. Yes, sir.

Q. Who introduced you to Harding? A. Charles Berry.

Q. Now, do you see in Court here today the Charles Berry that you testified to that you saw on August 29 of 1956 and August 31 of 1956? A. Yes, sir.

Q. Will you point him out, please? A. The gentleman in the white shirt and blue or black coat.

Q. And do you see the Defendant Harding? A. Yes, sir.

Q. In Court that you saw on August 29 of 1956, August 30 of 1956, and August 31 of 1956? A. Yes, sir.

Q. Will you point him out, please? A. The gentleman in the light sweater.

MR. McLAUGHLIN: May the record show that he identifies the Defendant Harding and also the Defendant Berry?

THE COURT: The record may so show.

* * * *

34 CROSS EXAMINATION

BY MRS. DWYER:

* * * *

39 Q. And how were you introduced to Berry? A. By Fat Man.

Q. Well, what did he say? Mr. Levine, this is Mr. Berry? A. No, ma'am.

Q. What did he say? A. He introduced me as an underworld -- I mean, telling them I was all right.

Q. In other words, he said you were a narcotics user; right? A. Ma'am? No, ma'am; I never said I was a narcotic user since I was working in it.

Q. Are you? A. No, ma'am.

Q. You have never used narcotics? A. No, ma'am.

Q. Well, did he call you by name or did he use a nickname?

40 A. They all use -- he said: This is my man. He is all right.

Q. That is all he said? A. Yes, ma'am.

Q. Didn't say: This is egghead or cabbage or turnip seed or anything like that? A. No, ma'am. Names don't mean too much in that part.

Q. All right. How did he introduce Berry to you? A. Just telling me, he is my man; he is all right.

Q. Did he say: This is Charles Berry? A. Yes, ma'am.

Q. Oh, he did? A. No, ma'am.

Q. Now, which was it? A. Well, I mean, I never asked a name.

Q. Did he volunteer the name? A. In the future, I learned his name.

Q. No, sir, that isn't what I asked you. At the time you first met Berry, did you know that his name was Charles Berry? A. No, ma'am.

Q. All right. When did you find out? A. Later.

Q. How much later? A. A week, I guess.

41 Q. A week? A. Around a week, yes, ma'am.

Q. And who told you? A. I was shown photographs.

Q. No, sir. That is not what I asked you. A. Who told me?

Q. Right. A. The back of his picture told me his name.

Q. That is what I wanted to know. And was that the way you learned Harding's name as well? A. Yes, ma'am. His real name.

Q. That is enough. You have answered the question.

Now, sir, you saw Berry twice and Harding three times; is that right? A. Yes, ma'am.

* * * *

43 Q. Now, on the 29th, when you came to Washington with Fat Man, and the rest, what time did you get here? What time? A. On the 29th?

Q. Yes. A. You mean, saw Harding?

Q. No, what time did you arrive in Washington? A. Around nine o'clock.

Q. What time did you first see the man you identified as Berry? A. Maybe 9:30 or a quarter of ten, something like that.

Q. It was after midnight when you encountered Harding; is that right? A. It was around midnight.

Q. By that time, where had Fat Man and the rest got to? Were they still with you? A. Yes, ma'am. Fat Man -- no, ma'am, Fat Man and them had already left me. They left me earlier.

* * * *

46 Q. Now, listen to me carefully, and I want just a, yes, or, no, to the question I am going to ask you. Did any of those three, that is, Fat Man, Bob and Dicky, at any time, in your presence, on the evening of the 29th, make a purchase of any capsules filled with little white powder? A. Yes, ma'am.

* * * *

53 A. No, ma'am; she went with the Agents.

Q. Where were you searched; or were you searched? A. At the Women's Bureau.

Q. Do you know if your car was searched? A. I know it was searched, yes, ma'am. They always do.

Q. In your presence? A. Yes, ma'am.

Q. Was this woman introduced to you in any way? A. Ma'am?

Q. Was the woman introduced to you? A. No, ma'am.

Q. She was just there? A. She left with the Agents. I didn't see her afterward. I saw her when she got in the car with the Agents; and where she went or what she did, I don't know.

Q. Did she appear to be in custody? A. I don't understand. You mean --

Q. Did she seem to be under arrest? A. No, ma'am; she was not under arrest.

Q. All right, sir. Now, you say that when Berry started to get out of the car on the 31st, you told him you didn't want to stay alone, and Harding left; is that right? A. Yes, ma'am.

54 Q. Harding came back and passed the stuff directly to you; right? A. Yes, ma'am.

Q. When did you pay him for it, before or after? A. After.

Q. Was that true on each of these occasions? A. Ma'am?

Q. Was that true on each of these occasions that you paid after? A. Yes, ma'am.

Q. And on this last occasion, were these bills recorded as to serial number? A. On all buys that I made, all the money was marked in my presence.

Q. Now, on any occasion since then, have you seen any of this money? A. No, ma'am, no more than the money that I turned in after with the evidence.

Q. I don't quite understand you. A. I carry more money than I actually intentioned to use.

Q. You refunded what you hadn't spent? A. Yes.

* * * * *

59 Q. And you were asked a question by my friend as to whether
60 or not any of those men, I believe, made a purchase of narcotics; is that right?

MRS. DWYER: No, sir. Just a moment, please, Your Honor. I object to that. That was not my question.

MR. McLAUGHLIN: Your question was, was there a sale of narcotics made at that time.

MRS. DWYER: I object.

MR. McLAUGHLIN: Isn't that question the question --

MRS. DWYER: No; I asked if a capsule of white powder --

MR. McLAUGHLIN: No, no; you didn't ask that.

MRS. DWYER: May we have the record checked?

MR. McLAUGHLIN: I think we can save time. I used the wrong word.

BY MR. McLAUGHLIN:

Q. I believe you were asked the question by my friend as to on August 29, when you were in the presence of the Defendant Berry and these other men that you came from Baltimore with, whether anyone made a purchase of any capsules. A. Yes, sir.

Q. Who made the purchase of capsules at that time? A. Fat Man and Dicky.

Q. Who did he make the purchase from? A. Berry.

* * * * *

73 JOHN JOSEPH GANNON

* * * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

* * * * *

Q. And during the month of August of 1956, where were you employed, Mr. Gannon? A. I was employed with the Federal Bureau of Narcotics.

Q. And assigned to what office? A. The Washington field office, as an agent.

* * * * *

80 Q. Now, recalling your attention to August 31 of 1956, do you recall whether or not you saw Mr. Levine on that date of August 31, 1956? A. Yes, sir, I do.

Q. All right. When and where did you see Mr. Levine on August 31, 1956? A. About 8:30 p.m., I met Mr. Levine in the parking lot at the Women's Bureau of the Metropolitan Police Department.

Q. Was there anyone with him at that time? A. At that time, he was alone when I met him.

Q. All right. And what did you do, if anything, to or with Mr. Levine at that time? A. At that time, I again searched him and his vehicle and gave him some Government money.

Q. Was any narcotics or moneys found on him or in his auto? A. No, sir, there wasn't.

Q. How much money did you give Mr. Levine on August 31? A. I gave him about $45.00, sir.

Q. Now, after you gave Mr. Levine $45.00, did you see where Mr. Levine went to? A. Yes, sir. He again drove to the vicinity of
81 the Sugar Bowl, which is 11th and P Streets.

Q. And how did you follow him to that immediate vicinity? A. I was driving directly behind him; and I parked again along P Street, in my usual position.

Q. All right. What happened to Mr. Levine when he arrived at 11th and P, I believe you said? A. He got out of his car again and walked south on 11th Street. I didn't see him enter the Sugar Bowl because he was out of my view.

Q. After you saw him walking in that direction, did you see him any more that night? A. Yes, sir. I saw him return to his car.

Q. When he returned to the car, was he alone? A. No, sir, he was accompanied by two gentlemen.

Q. All right. When he went to the automobile with the two gentlemen, then what next happened? A. After they got into the car, they again drove to the 12th and T vicinity.

Q. And what happened when they arrived in that immediate vicinity? A. And the taller gentlemen left the car of Mr. Levine and entered the Whitelaw Hotel.

Q. All right. What happened after that? A. He came out shortly
82 thereafter, and returned to the car; and they again returned to 11th and Rhode Island Avenue, where they left the car.

Q. When who left the car? A. The two gentlemen who were accompanying Mr. Levine.

Q. Did you see Mr. Levine after that? A. Yes, sir. He drove to the vicinity of, I think it was, 5th and Rhode Island at this time.

Q. While at 5th and Rhode Island Avenue, did you have occasion to talk to Mr. Levine? A. Yes, I did. I asked him what he got.

Q. I will show you Government's Exhibit marked for identification No. 3, and ask you, Mr. Gannon, if you can identify that? A. Yes, sir. This exhibit contains my initials.

Q. And you identify Government Exhibit marked for identification No. 3 as what? A. As a cellophane wrapping from a cigarette package, containing capsules which have white powder in them.

Q. And you received that Government Exhibit marked for identification No. 3 from whom? A. From Mr. Levine, as well as I can recall.

Q. After you received Government Exhibit 3 from Mr. Levine, what did you do with it? A. I think at the time I gave it to Agent Dick.

83 Q. Now, Mr. Gannon, you testified that you saw Mr. Levine on the date of August 31 contact two gentlemen who were in the car and rode around; is that right? A. Yes, sir, I did.

Q. Do you see those two gentlemen here today? A. Yes, sir, I do.

Q. Will you point at them, please? A. The tall gentleman with the yellow shirt, and the person right next to him with the dark coat on him.

MR. McLAUGHLIN: May the record show he identified the Defendant Harding and the Defendant Berry?

THE COURT: The record may so show.

* * * * *

89 FRED T. DICK

* * * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

* * * * *

Q. And where are you employed? A. I am employed as a Narcotic Agent with the Treasury Department, Washington, D. C.

Q. Were you so employed during the month of August of 1956? A. Yes, sir.

* * * * *

97 Q. I will show you Government Exhibit marked for identification No. 3, and ask you if you can identify that, Mr. Dick? A. Yes, sir, I can.

Q. You identify Government Exhibit marked for identification No. 3 as what? A. As the 30 capsules of white powder turned over to Narcotic Agent Gannon by Joe Levine on August 31.

Q. On August 31, after that exhibit was turned over to Mr. Gannon by Levine, did there come a time when it was in your possession? A. Yes, sir.

Q. And who turned it over to you? A. Narcotic Agent Gannon.

Q. All right. What did you do with it after it was turned over to you? A. I weighed and sealed the capsules in the locksealed envelope.

Q. Did you, in turn, turn it over to anyone? A. I then returned it to Agent Gannon for delivery to the United States Chemist.

Q. Now, on these two occasions, that is, August 30 and August 31 of 1956, were you in charge of that detail at that time? A. Yes, sir.

98 Q. And on these occasions, that is, August 30 and 31, was there marked money? On those occasions were the serial numbers of the moneys taken by the Agent that was given to Levine? A. Yes, sir, the serial numbers of all the Government funds were listed.

Q. Now, you testified, I believe, about your observation on August 30 and August 31 of 1956.

Is there any reason why an immediate arrest wasn't made of these Defendants at that time? A. Yes, sir, there were two reasons. The first reason was the fact that special employee Joe Levine was then working undercover for the Washington Narcotics Office in other cases as well as this one; and it would have then jeopardized other investigations to arrest these Defendants and reveal his identity.

The second reason was, at that time, through surveillance, and the asistance of the Metropolitan Police Department Policewoman, I was attempting to locate the cache of drugs maintained at the Whitelaw Hotel to which the Defendant Harding had access.

Q. Now, you testified, I believe, on two occasions, that is, on August 30 and August 31, that you observed Harding; is that right?

99 A. Yes, sir.

Q. Do you see him in Court here today? A. Yes, sir, I do.

Q. Will you point him out, please? A. Seated at the counsel table wearing a beige cardigan sweater and a yellow sport shirt.

MR. McLAUGHLIN: May the record show he identifies the Defendant Harding?

THE COURT: It may so show.

BY MR. McLAUGHLIN:

Q. On August 31, I believe you testified that you saw Mr. Levine with two subjects in his automobile.. Are you able to identify both of those men at this time? A. No, sir, not the second subject. I am able to identify the Subject Harding, but not the other Defendant.

* * * * *

108 JAMES L. YOUNG

* * * * *

DIRECT EXAMINATION

BY MR. MCLAUGHLIN:

* * * * *

Q. And you are employed where? A. United States Treasury Department.

Q. And have been employed there in what capacity? A. As a chemist for thirty-eight years.

MR. McLAUGHLIN: Will you stipulate his qualifications?

MRS. DWYER: I certainly will.

* * * *

111 Q. I will show you Government Exhibit marked for identification No. 3-A, and ask you if you can identify that? A. Yes, I can, sir.

Q. You identify Government Exhibit marked for identification 3-A as what? A. This is an evidence envelope which was handed to me by Officer Gannon, of the Federal Bureau of Narcotics, on September 3, 1956.

Q. Is there any difference in its condition today than when it was turned over to you by Agent Gannon? A. Yes, there is, sir.

Q. What is that? A. At the time this envelope was received, it was metal-sealed; and it was intact.

Q. Who opened it? A. I opened it.

Q. And at the time that you opened it, did it contain Government Exhibit marked for identification No. 3? A. Yes, it did.

Q. All right. What did Government Exhibit No. 3 consist of? A. A cellophane containing 7 gelatine capsules, each containing a white powder. In addition to the 7 capsules containing a white powder, con-

112 taining heroin hydrochloride, a narcotic drug, quinine hydrochloride and mannitol, there were also 23 capsules, making a total of 30 capsules. Twenty-three of these capsules contained no narcotic drug, being a mixture of quinine hydrochloride, corn starch and milk sugar.

Q. Would you say all this heroin that you have identified is a derivative of opium? A. Yes, I would.

* * * *

114 MR. McLAUGHLIN: The Government rests its case.

* * * *

115 (Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MRS. DWYER: Two o'clock slipped a little bit.

THE COURT: It has up to date. I don't know what you are going to do.

MRS. DWYER: May it please the Court, at this particular time, I would like, first of all, to renew the motion which I made at the close of Mr. McLaughlin's opening argument. That is, as to the last three counts as to the Defendant Berry.

As I recall the evidence, we are still in the same posture that we were then; that is, that Berry did not leave the car, and did not participate in any way in assisting Harding in acquiring or delivering these drugs; nor is there any evidence.

THE COURT: That may call for an instruction on aiding and abetting; but it doesn't seem to the Court that the fact that the testimony does not indicate that the Defendant Berry left the car at that time would be sufficient justification to cause the Court to hold, as a matter of law, that there is nothing for a jury to pass upon.

MRS. DWYER: Well, I would just like to say this to the Court: That there is certainly no evidence that he assisted or aided in any wise in that transaction.

116 THE COURT: The Court has indicated its view. Went down there in the automobile with him. If necessary, on Counts 7, 8 and 9, to instruct the jury on aiding and abetting, the Court would feel justified in doing it. But certainly the Court doesn't feel that there is nothing to present to the jury.

What is the Government's position?

MR. McLAUGHLIN: The Government's position is this: You recall the testimony was on August 29, that it was the Defendant Berry --

MRS. DWYER: The 31st, I think you mean.

THE COURT: It is the last three counts.

MRS. DWYER: The last three counts are on the 31st.

MR. McLAUGHLIN: I appreciate that. I am getting the continuity of the thing.

On August 29, when Levine came over to Washington here with these other people, who introduced him to Berry and who said that he was all right? They introduced him to Berry, and said Levine was all right, in other words, to sell to. Then the Defendant Berry introduced Levine to the Defendant Harding;and then that night they had a transaction. And then the second time, on the 31st, when they met for the purpose of purchasing narcotics, and actually continued right on the original introduction.

* * * *

117 THE COURT: This motion is directed to the last three, the 31st.

MR. McLAUGHLIN: The 31st, yes.

THE COURT: The point made by counsel for the Defendant is that the record indicates pretty positively, or negatively, that the Defendant Berry did not leave the automobile.

MR. McLAUGHLIN: That is true.

THE COURT: In which Defendant Harding and Levine had been with Berry and had driven to a certain point; at which point, the testimony was, as the Court recalls it, that the witness Levine said he didn't want to sit there alone.

MR. McLAUGHLIN: Called him back.

THE COURT: And he said he didn't want to sit there alone; and following that statement, Berry remained in the car.

It is the Court's view that it would be naive for the Court to dismiss this case against Berry; but it does leave a question as to whether or not there is sufficient evidence to justify, under all the circumstances, on the part of the Jury that he was aided and abetted.

MR. McLAUGHLIN: I think there is, Your Honor, because working back to the original meeting on the 29th, when he was introduced to Levine and he introduced Harding to Levine; Berry did.

118 THE COURT: I am in agreement with you. Just a question, do you feel it is justified to let it go that way?

MR. McLAUGHLIN: I think so.

THE COURT: I am of the opinion that driving up there, under all the circumstances, in view of the definite evidence of the identification of the Defendant Berry, in the Defendant Berry's presence, without any protest, and that on the 29th, two days before, there was evidence of his definite participation --

MRS. DWYER: I am not arguing about the first time.

THE COURT: I think if the Government is willing to submit it without an instruction on aiding and abetting, the Court would only out of abundance of caution indicate the possibility of giving that instruction.

The Court is not of the opinion that there isn't any evidence here to justify conviction of Berry on the third count because of his participation.

The Court will note the motion which was made at the close of the Government's opening statement, and now renewed at the close of the Government's case.

The Court will overrule the motion.

Do you have another motion now?

MRS. DWYER: Well, I would simply like to register a general motion for judgment of acquittal as to both Defendants.

119 THE COURT: Yes. General motion for acquittal will be noted; and that will be overruled.

* * * *

131 CHARLES BERRY

* * * *

132 DIRECT EXAMINATION

BY MRS. DWYER:

Q. Now, Mr. Berry, you heard what I told your sister and mother. Keep your voice up so we can all hear you.

Your name is Charles Berry? A. Yes.

Q. And you are one of the two Defendants indicted in this case; is that right? A. Yes.

Q. Mr. Berry, you have heard Levine this morning testify that you either sold or help sell him narcotics on two occasions last August. Did you. A. Yes.

Q. You helped sell him narcotics? A. No. I have never seen that fellow there in my life, Mr. Joe Levine, Levines, rather.

Q. To the best of your knowledge, sir, when was the first time you ever saw Levine? A. The first time I ever saw Levine when I sit in that chair this morning and he walked in that door and walked out. I was described of how he looked through another inmate that I met while I was over to the Jail. That is the onliest reason that I could tell what he looked like by the hair that he wore, and the thick mustache.

* * * *

Q. All right, sir. Now, directing your attention to the last
133 week in August, that is, the week before Labor Day, where were you? A. I left Washington. I quit my job in the latter part of July. I was a parking lot attendant. I quit my job, I did; and I won a little money; and I made up in my mind that I was going to break my habit, which I did have a habit.

Q. When you say you had a habit, what do you mean? A. I was a user of drugs.

Q. All right, go ahead. A. I left Washington on the 26th.

Q. Of what? A. Of July, I did, and --

Q. Do you mean July or do you mean August? A. I mean July. I left Washington in July, I did.

Q. Go ahead. A. And I goes to Baltimore. After I was in Baltimore for around about two weeks, I commenced getting sick, I did; so I decided I need me some medicine in order to break my habit. So I was determined on staying there, because I was going to break my habit without any medicine, I was. So I comes back to Washington here on the 3rd of September. I sees a girl I know; and I ask this girl -- her name was Bobby -- I asked this Bobby did she know where Ernest lived at; that is, Ernest Harding.

134 She tells me that Ernest live on P Street. So she takes me around there to see Ernest.

Q. Excuse me. When you talk about Ernest, whom do you mean? A. The fellow with the yellow shirt on.

Q. The other Defendant? A. Yes, the other Defendant.

So after I go to see Ernest, Ernest asked me what was I doing back in Washington. So I tells him I am going to the hospital to see can I get me some medicine in order to break my habit.

Q. All right, now, Mr. Berry. Did there come a time when you and Harding voluntarily committed yourselves to the hospital for treatment? A. Yes; that was on the 5th of September, we paid $2.40 to go into the hospital, it was.

* * * *

135 CROSS EXAMINATION

BY MR. McLAUGHLIN:

Q. You had known Harding in Baltimore; had you not? A. I had been knowing Harding ever since we was around ten years old; raised up together.

Q. You grew up together in Baltimore; isn't that right? A. Yes.

* * * *

137 Q. In 1956, you started on heroin; is that right? A. Yes, sir.

Q. You were using heroin right up until the time, would you say, that you went to the hospital in September, the fifth or so? A. No, I stopped using -- I stopped using heroin at the 26th of July.

Q. Twenty-sixth of July? A. Yes, sir. I stopped using it. I haven't had any more heroin since then.

Q. How many caps were you using when you stopped? A. Well, I was using no more than around about 2 or 3 capsules; but in my jacket there, I told the hospital that I was using 4 or 5 capsules three times a day now. Why I told them that, because I was sick. I wanted to get some medicine in order to make me feel better, because I went to the hospital at one o'clock, and it was five o'clock before they had done anything for me; and I still hadn't had any medicine to make me feel better.

Q. You mean by that you were having withdrawal pains? A. Yes, sir.

* * * *

138 Q. And you testified that you hadn't used any narcotics prior to that, I think you said, in July; is that right? A. The 26th, sir.

Q. The 26th of July? A. Yes, sir.

Q. Don't you get those withdrawal symptoms about twenty-four or forty-eight hours after you use narcotics? A. I was having withdrawing symptoms -- I was having symptoms from not using, I would say, three days -- I would say on the 3rd of August, I was having withdrawal symptoms, which I meant when I said I needed medicine, I was weak.

* * * *

141 Q. You know where the Sugar Bowl is; don't you? A. Yes.

Q. And you are familiar with that immediate neighborhood; are you not? A. Yes, I have been past the Sugar Bowl.

Q. What? A. I have been past the Sugar Bowl; walked past the Sugar Bowl.

Q. Well now, about that time, we will say from August 29 and August 30 and 31st, did you have any livelihood? How did you make your living? A. Well, as I told you, I was working as a parking lot attendant.

Q. Where? A. During that time, I wasn't in Washington from the 29th or 30th or 31st. I was in Baltimore.

Q. Were you working on those days in Baltimore? A. No, I wasn't working. I was home.

Q. Did you have any means of livelihood at all? A. Well, after

142 I quit my job, I won a little money, I did. To tell you the truth, I went around a crap game and I won a little money. So in order for to carry me over while I was in Baltimore, I just took this money what I had and I went on over into Baltimore, I did.

Q. Your purpose in coming over to see Harding here in Washington was not to get more narcotics for yourself; was it? A. I have never seen Ernest with any narcotics; and we have never used any narcotics among each -- in each other's presence.

Q. You never have? A. I knowed Ernest used narcotics, but we have never used any in each other's presence.

Q. You never have? A. Never have.

Q. Well now, when you were in Washington, you had a source of supply in Washington where you could buy it, didn't you? A. What did you say now, sir?

Q. I said, while you were in Washington, you had a source of supply where you could buy it? A. Oh, yes.

Q. You knew those who sold it? A. Oh, yes, yes.

143 Q. Did you ever have any occasion to buy any out of the Whitelaw Hotel? A. No, I never.

Q. What? A. No.

Q. Did you buy it up in that section of the city? A. No, I never.

Q. Around the Sugar Bowl? A. No.

Q. What section of the city did you buy it? A. Southwest.

Q. Is that the only place? A. Well, southwest, and down by -- down the park -- down here on around 14th and I. I used to meet a fellow in the park there, I did.

Q. Do you deny that you were in Washington on August 29th?

A. Yes, sir.

* * * *

156 ARGUMENT BY COUNSEL FOR THE GOVERNMENT

MR. McLAUGHLIN: If it please the Court, and you ladies and gentlemen of the Jury: In my opening statement, I told you what I intended to prove; and, of course, you had an opportunity to hear and see the witnesses to satisfy yourselves as to whether or not the Government has proven its case to you, for you to say that these Defendants are guilty beyond a reasonable doubt.

Now, you heard the testimony of Mr. Levine. Mr. Levine told you that he was employed, as they call it, as a special employe for the Narcotics Bureau. Of course, some of the people might say he is an informer, as they call them; but, ladies and gentlemen of the Jury, as far as the narcotic traffic is concerned, you can very easily understand where such an individual is a necessity.

In other words, the police can't operate without them. There is no use kidding ourselves. Because in order to buy that narcotics, you have got to be known; or if you are not known, someone has to
157 introduce you to those who are selling.

You heard him testify that on August 29 he came over to Washington here, and that he met the Defendant Berry through one of these men who came over from Baltimore with him.

There is only one conclusion you can come to from the evidence in this case, that those men came over here, from the testimony, to buy narcotics from Berry, because he said when they first met, that this man from Baltimore introduced him to Berry and said that he was O.K., meaning in that language that he was all right to sell to.

And you heard Levine say at that time that Berry had a transaction with one of these men; and then when Levine asked Berry as to where, I believe, Iggy was, meaning the Defendant Harding, did Berry know Harding at that time? Was there some friendship between he and Harding?

Oh, it is most unusual, ladies and gentlemen of the Jury, that these police officers would testify that on the 30th that they saw Harding, and on the 31st that they saw Harding and Berry, both of them together, and then after we arrest them, we find out that these two people do know one another, that they have been in one another's company, from their own testimony; and in addition to that, we have them both addicts. Known or should have known or did know as to the traffic of narcotics
158 here in the District of Columbia.

Doesn't that corroborate to a certain extent the testimony of Levine, the testimony of Gannon, the testimony of Fialkewicz, and the testimony of Dick?

Now, these officers are out there, and they are out there for one purpose. When they got the information from Levine that he had made this purchase on his own on the 29th, naturally, the next thing for the police officers to do is try to make another buy, so they, the police officers, can make an observation to see who is selling this narcotics;

so that when the case comes to Court, we not only are asking you to believe the testimony of Levine, who said he made the purchase, but we are asking you and showing you that the police on those different occasions were in a position where they could see the man who made the transaction with Levine. So that when we come to Court, we would not be in a position to ask you to believe just the testimony of Levine.

We are asking you to believe the testimony of the police officers who were out there for that particular purpose, to see and observe those who might transact narcotics to Levine.

So when my friend might say these police officers didn't see what they said they saw, did they see Hardinggo to that Whitelaw Hotel? Officer Dick testified that he followed him. Now, did he have an oppor-
159 tunity to see him during that time? And did these other officers, who were out there for that specific purpose, to see? They weren't out there just to loo at the scenery. They weren't out there to see people who walked up and down the street. They were sighting on a particular person or persons who would contact Levine.

So when they testify from that stand that these are the men over this period of time that did have the transactions with Levine, were they in a position to see them, and are they in a position to identify them when they see them again?

So, ladies and gentlemen of the jury, I don't think it needs a long argument to you, because you had an opportunity to see and hear those who testified here. And you heard the testimony of both Defendants.

I say, from your observation of them, their demeanor on the stand, whether or not, as far as Berry is concerned, that narcotics has affected his mind so that he is not very coherent, and I say, ladies and gentlemen of the Jury, if he honestly told you, he would have to tell you that he didn't know where he was.

Of course, as far as the Defendant Harding, you heard him testify. You heard him testify as far as ability is concerned as to making a livelihood.

Then you heard the family of the Defendant Berry testify. I say
160 to you ladies and gentlemen of the Jury, in all due respect to them, as far as the mother was concerned, she really didn't know when that boy was in Washington or when he was in Baltimore; because you heard her testify that he was over here and she didn't know where he was, where he lived, or what he was doing here, in fact.

Now, the sister testified that on these occasions she would see him. I thought she was going to say that during that period of time that she just happened to be home on those occasions. She didn't remember whether she saw him the weekend before that.

So I say to you ladies and gentlemen of the Jury, I am asking you to believe the testimony of the Agents. Surely we had enough of them here to testify as to the identity of these two Defendants. And from the evidence in the case, the Government is asking you to bring in a verdict of, guilty as charged.

* * * *

184 COURT'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the Jury, the case upon which you are sitting as Jurors is the case of the United States v. Ernest E. Harding and Charles H. Berry.

In these instructions, I shall at times refer to Ernest E. Harding
185 and Charles H. Berry as the Defendants.

I shall now read to you the indictment of the grand jury in which is set forth the charges against the Defendants.

The indictment of the grand jury reads as follows:

The first count:

"On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Joseph Levine, as provided by law.

"Second count:

"On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and
186 milk sugar. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

"Third Count:

"On or about August 29, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry facilitated the concealment and sale of a narcotic drug, that is, one capsule containing a mixture totaling about 1.0 grain of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Ernest E. Harding and Charles H. Berry, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

" Fourth Count:

"On or about August 30, 1956, within the District of Columbia, Ernest E. Harding did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and
187 mannitol, not in pursuance of a written order, written for that purpose, from the said Ernest E. Harding, as provided by law.

"Fifth Count:

"On or about August 30, 1956, within the District of Columbia, Ernest E. Harding purchased, sold, dispensed, and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is,

eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol. This is the same heroin hydrochloride, which is mentioned in the fourth count of this indictment.

"Sixth Count:

"On or about August 30, 1956, within the District of Columbia, Ernest E. Harding facilitated the concealment and sale of a narcotic drug, that is, eighteen capsules containing a mixture totaling about 16.0 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after the said heroin hydrochloride had been imported, with the knowledge of Ernest E. Harding, into the United States contrary to law.
188 This is the same heroin hydrochloride which is mentioned in the fourth and fifth counts of this indictment.

"Seventh Count:

"On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry did sell, barter, exchange and give away to Joseph Levine a narcotic drug, that is, seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride, quinine hydrochloride, and mannitol, but not in pursuance of a written order, written for that purpose, from the said Ernest E. Harding and Charles H. Berry, as provided by law.

"Eighth Count:

"On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride, quinine hydrochloride, and
189 mannitol. This is the same heroin hydrochloride which is mentioned in the seventh count of this indictment.

"Ninth Count:

"On or about August 31, 1956, within the District of Columbia, Ernest E. Harding and Charles H. Berry facilitated the concealment and sale of a narcotic drug, that is, seven capsules containing a mixture totaling about 7.0 grains of heroin hydrochloride, quinine hydrochloride and mannitol, after the said heroin hydrochloride had been imported, with the knowledge of Ernest E. Harding and Charles H. Berry, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the seventh and eighth counts of this indictment."

You have heard the evidence and the statements and arguments of counsel for the prosecution and for the Defendants.

It now becomes your duty to determine whether the Defendants are guilty or not guilty of the offenses with which they are respectively charged.

Before discussing the charges against the Defendants in detail, I shall first summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

190 It is the function and the duty of the Jury to determine the issues of fact. It is the duty of the Court to instruct you ladies and gentlemen of the Jury as to the principles and rules of law governing the case. You are bound and obligated to follow the Court's instructions as to the law, and to take the law from the Court.

On the other hand, ladies and gentlemen of the Jury, you are the sole judges of the facts; and you must determine the facts for yourselves, solely upon the evidence presented at this trial.

The fact that a defendant is charged with a crime and has been indicted is not to be taken as any indication of his guilt. The sole purpose of an indictment is to bring a defendant before the Court. An indictment is merely the machinery and the procedure provided by law for placing a defendant on trial.

You will bear in mind this instruction as to the character and purpose of an indictment in connection with the specific instructions concerning the indictment in this case which the Court will give you later during the course of these instructions.

When the Defendants in this case were arraigned, they pleaded, not guilty, to each and every count of the indictment. Every defendant
191 in a criminal trial is presumed to be innocent. This presumption of innocence attaches to the defendant throughout the trial.

Having given you the foregoing instructions as to the general principles of law which you are to bear in mind, I shall now instruct you as to the particular offenses alleged to be involved and the specific law applicable to said alleged offenses.

The Court has already read to you the indictment, that is, the charges made against the Defendants. In this case, there is a total of nine counts charging one or both of the Defendants with violations of three sections of the United States Code; namely, Counts 1 and 7 charging both Defendants and Count 4 charging only the Defendant Harding with a violation of Section 4705(a), of Title 26 of the United States Code; counts 2 and 8 charging both Defendants, and count 5 charging only Defendant Harding with violation of Section 4704(a) of Title 26 of the United States Code; and counts 3 and 9 charging both Defendants, and count 6 charging only Defendant Harding with violation of Section 174 of Title 21 of said Code.

There are nine counts in the indictment in this case. The Court admonishes you to give attention to the instructions as to these counts and the statutes involved.

With respect to the charges contained in the indictment from the
192 standpoint of the alleged times or the alleged dates on which it is charged the alleged offenses were committed, your attention is directed to the following.

The offenses charged in Counts 1, 2 and 3 allegedly were committed by both Defendants on August 29, 1956. The offenses charged in Counts 4, 5 and 6, allegedly were committed by the Defendant Harding

only on August 30, 1956. And the offenses charged in Counts 7, 8 and 9 allegedly were committed by both Defendants on August 31, 1956.

You will be permitted to take the indictment into the jury room with you.

Your attention is again called to the instruction previously given you, namely, that the fact that a defendant has been indicted is not to be taken as any indication of his guilt. Therefore, the indictment is to be made use of by you in the jury room not as indicating in any way that the Defendants, or either of them are guilty; but as a means of reference as to the identity of the alleged offenses charged in the specific counts of the indictment, as to the status of the particular Defendant or Defendants charged in the particular counts of the indictment, and as to the dates when said alleged offenses are alleged to have been committed.

I shall now instruct you specifically regarding the sections of the United States Code which I have already referred to, and which, as
193 previously stated, are the Sections of the Code which the Defendants are charged in the indictment with having violated.

As to Section 4705(a) of Title 26, violations of which are charged in Counts 1, 7 and 4, respectively of the indictment, you are instructed that said Section 4705(a) reads as follows, and I quote from the section of the statute:

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate."

In other words, the violation to which the statute refers consists of selling, bartering, exchanging or giving away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given away on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate.

As to Section 4704(a) of Title 26, violations of which are charged in Counts 2, 8 and 5, respectively, of the indictment, you are instructed that said Section 4704(a) reads as follows, and I quote from that section of the statute:

194 "It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package, and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

That is the end of the quote from the section of the statute, and the Court goes on with the instruction. In other words, the violations to which the statute refers consist of purchasing, selling, dispensing or distributing a narcotic drug except in the original stamped package or from the original stamped package.

Now, the law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. That is, if it is proved beyond a reasonable doubt that the Defendants, or either of them had possession of this drug, and that while in the possession of said Defendants, there were no appropriate tax-paid stamps for those drugs, those facts constitute prima facie evidence of a violation of the statute, and the Jury may find the Defendants or either of them guilty on that charge, if it sees fit to do so, without requiring any further proof.

195 As to Section 174, Title 21 of the United States Code, violation of which is charged in Counts 3, 9 and 6 of the indictment, respectively, you are instructed that said Section 174 of Title 21 of the Code reads as follows, and I quote from the statute:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, contrary to law -- and the definition of such narcotic drugs includes any derivative of opium -- or assists in so doing, or in any manner facilitates the transportation, concealment or sale of any such

narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be punished as the statute provides."

That ends the quote from that section of the statute.

The Court goes on with the instruction.

Now, this section of the statute provides that any person shall be punished as the statute provides who is convicted of fraudulently receiving, concealing, buying, selling and facilitating the transportation and concealment after importation of any derivative of opium, which the Defendants then and there well knew had been imported into the United

196 States contrary to law. But the law goes further and states that the Government does not have to prove every element of the offense as the statute analyzes it; but if the Defendant is shown beyond a reasonable doubt to have had possession of the narcotic drugs referred to in Section 174, Title 21 of the United States Code, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

In other words, if you find that the defendants, or either of them had possession of the narcotic drugs referred to in the indictment, with which the Defendant is charged with having possession, and in the District of Columbia, then, from that fact alone, you are at liberty to find the said Defendant so found by you, the Jury, to have had possession of said narcotic drug, guilty of a violation of the statute without anything more, unless the said Defendant, either by himself or by some other witnesses, explains the possession of the drug to your satisfaction.

The burden of proof is on the Government to prove the Defendants guilty beyond a reasonable doubt. Unless the Government sustains this burden, and proves beyond a reasonable doubt that the Defendants have committed every element of the offenses with which they are charged, the Jury is bound to find them, not guilty.

197 I said a moment ago that the burden is on the Government to prove the Defendants guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever.

It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself, and not just any whimsical speculation or capricious conjecture.

Proof beyond a reasonable doubt simply means this: If, after an impartial comparison and consideration of all the evidence, you can say to yourself that you are not satisfied of the Defendants' guilt, then you have a reasonable doubt. On the other hand, if, after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the Defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is proof which will result in an abiding conviction of the Defendants' guilt on your part, such conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

198 In determining whether the Government has established the charges against the Defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified before you, and take into account all the circumstances concerning which testimony has been introduced.

You, the jury, will make a determination and return a verdict as to each Defendant on each offense with which each Defendant is charged in the indictment. Your verdict as to each Defendant on each count shall be either, guilty, or, not guilty.

You are the sole judges of the credibility of the witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. And in reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider the demeanor and the behavior of the witness on the witness stand, the witness' manner

of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of this case.

All these matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in
199 determining what witnesses to believe and to what extent to credit them.

If you find that any witness wilfully testified falsely to any material fact concerning which the witness could not, in your judgment, have possibly been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness, or any part of the testimony of the witness which you may see fit to disregard.

The Witness Levine in this case was an employed informer. In this connection, you are instructed that the testimony of an employed informer should be viewed with suspicion and received with caution, and should be scrutinized closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the Witness' own interests.

The degree of credibility which should be given such testimony is a matter exclusively within your province as Jurors, as is the credibility of any witness, and I have previously instructed you a few moments ago.

In this case, you have heard the testimony of police officers or agents. You are instructed that in weighing the credibility of these officers or agents, as well as any other witnesses in this case, you should consider the interest which the witness might have in the result of the case.

200 Where a witness has a direct personal interest in the result, there is a strong temptation to color, pervert or withhold facts. The rule applies to the police officers or agents, as well as to all other witnesses in the case.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

There is evidence here of former convictions of the Defendant Harding of criminal offenses on previous occasions. This evidence must not be considered by the Jury in connection with the question of the guilt or innocence of Defendant Harding in this case. It may be considered by you, ladies and gentlemen of the Jury, only in connection with the credibility of the testimony of Defendant Harding. That is to
201 say, only in connection with the question of the credibility of the Defendant Harding as a witness. You should bear clearly in mind that conviction of the Defendant Harding of a criminal offense at some previous time is no proof that he is guilty of the offense with which he is now charged.

The Court instructs you that if there is a conflict in the evidence in this case on any fact or circumstance tending to establish either the guilt or the innocence of the Defendant, a part of which is in favor of the theory of the Government, and a part of which is in favor of the theory of the Defendants, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence or the theory or the conclusion which is most favorable to the Defendants.

At times during the trial, the Court has been called upon to make rulings on certain legal matters, that is, on questions involving law. Rulings on questions of law are the concern of the Court solely. Your

concern is solely with questions of fact, and with the application of the Court's instructions to the testimony and the other evidence in the case as to those instructions, and as those instructions relate to your determination of fact.

Your verdict must not be influenced by the decisions on matters
202 of law made by the Court during the trial except as those decisions of the Court are reflected in the Court's instructions to the Jury.

Throughout the trial, the Court has made rulings on the question as to whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings by the Court, and are not to draw any inferences from them. Whether evidence offered is admissible is purely a question of law for the Court's determination. In admitting evidence to which objection is made, the Court does not determine what weight should be given such evidence.

The ruling by the Court permitting testimony to be given or other evidence to be introduced is not to be considered by you, the Jury, as any indication as to what weight said testimony or other evidence may or may not have. What weight is to be given to evidence is strictly a matter for you, the Jury, to determine for yourselves.

Nor does the Court pass upon the credibility of any witness who testified. A ruling by the Court permitting a witness to testify or give evidence is not to be considered by you, the Jury, as any indication as to what the credibility of that witness may or may not be. The credibility of a witness is likewise a matter strictly for you, the Jury, to determine for yourselves.

203 On the other hand, as to any offer of evidence that was rejected by the Court, you, of course, must not consider that evidence; and as to any question to which an objection was sustained, you must not conjecture or guess or speculate as to what the answer might have been or as to the reason for the objection or for the ruling of the Court.

In this case, there have been instances when certain evidence relating to the words or actions of one of the Defendants but did not relate to the words or actions of the other Defendant. It may be difficult

for you, when considering the case for or against any one certain defendant, to disregard any evidence that does not relate to said Defendant, but that is your plain duty with respect to the evidence, and you must try conscientiously to so treat such a situation.

The Defendant Berry in this case has denied that he committed the offenses with which he is charged and in connection with this denial has asserted the defense of an alibi.

The defense of an alibi, if established, is a legal and proper and valid defense. The word "alibi" is a Latin word, meaning "elsewhere." And the defense of an alibi, as the word indicates, is that the Defendant was elsewhere than at the scene of the alleged offenses at the time that it is charged they were committed.

204 If, after a consideration of all the evidence, you have a reasonable doubt that the Defendant Berry was present at the time of the alleged offenses, your verdict should be, not guilty, as to said Defendant Berry.

As I have already instructed you, ladies and gentlemen of the Jury, you are to determine the facts for yourselves solely upon the evidence presented at the trial. Now, in this connection, you are instructed that statements or arguments by counsel, the attorneys for the Government and for the Defendants, statements or arguments by the lawyers are not evidence and are not to be taken or considered as evidence. Arguments by lawyers are made to assist you in analyzing and appraising and evaluating the evidence, and are to be so considered and so considered only by you.

Every case is to be determined without bias, prejudice or sympathy for or against either side, and solely upon the testimony of the witnesses under oath, the evidence, and the Court's instructions as to the law.

You have now heard the Court's instructions. If, in all these instructions, from beginning to end, any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. Therefore, you are not to single out any certain

sentence or any individual point or instruction and ignore the others. But you are to consider all the instructions as a whole and to regard
205 each in the light of all the others.

Now, ladies and gentlemen of the Jury, I want you to take this matter and consider it deliberately in the light of the instructions which I have given you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday lives.

The Court has read and explained to you the offenses with which the Defendants are charged in the indictment. The indictment consists of nine counts. In this case, there are two Defendants. It is your duty to consider all the evidence as to each Defendant and to return a verdict as to each Defendant.

That is to say, you are to consider all the evidence that is applicable to the count with which the Defendant is charged.

The Court has prepared for your convenience a form of verdict which, when you shall have agreed upon your verdict, your foreman will fill out and sign. This form of verdict may be filled out by the insertion of the word "guilty" or the words "not guilty" in the appropriate space as to each Defendant as to each count in which said Defendant is charged in the indictment. When so filled out and signed by your foreman, this form of verdict may be used by your foreman in announcing
206 your verdict in Court at the conclusion of your deliberations.

The Clerk will hand you this form of verdict when you retire to the jury room. As you, of course, know, your verdict as to each count as to each Defendant must be by unanimous vote.

Before commencing your deliberations, you will choose one of your number foreman. Whenever you shall have arrived at your verdicts, notify the Marshal, whereupon you will be escorted back to the courtroom to return your verdict.

You will please remain in your seats in order that the Court may afford counsel on either side, if they desire to do so, an opportunity to approach the bench. Do counsel desire to approach the bench?

MR. McLAUGHLIN: No.

MRS. DWYER: May we come to the bench, Your Honor?

THE COURT: You may.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MRS. DWYER: This is not to object to the charge. I merely wanted for the record to renew all motions before you sent the Jury out.

THE COURT: The record will indicate all motions made by Defendants' counsel are renewed. The Court notes all said motions. All said motions are overruled.

* * * *

208 THE CLERK: What say you as to the Defendant Charles H. Berry on Count 1?

THE FOREMAN: Not guilty.

THE CLERK: Count 2?

THE FOREMAN: Not guilty.

THE CLERK: Count 3?

THE FOREMAN: Not guilty.

THE CLERK: Count 7?

THE FOREMAN: Guilty.

THE CLERK: Count 8?

THE FOREMAN: Guilty.

THE CLERK: Count 9?

THE FOREMAN: Guilty.

* * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14080

CHARLES BERRY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
CARL W. BELCHER,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 28 1958

Joseph W. Stewart
CLERK

No. 14080

QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

1. Did appellant "open-the-door" to testimony identifying appellant as the vendor in a narcotics offense not charged in the indictment, by showing the fact of such transaction under circumstances indicating a relation to this case and the proximity of appellant?

2. Does the record show the codefendant's actual possession, was a possession as partner with appellant in repeated sales of narcotics?

3. Was an aider-abettor instruction required despite appellant's objection to it, and the Government's theory of partnership?

454420—58——1

INDEX

	Page
Counterstatement of the Case	1
Statutes Involved	5
Summary of Argument	6
Argument:	
I. The Evidence of Another Offense Was Elicited by Appellant's Trial Counsel	7
II. The Record Clearly Demonstrates Appellant's Constructive Possession of Narcotics, and Partnership in its Sale	8
III. The Aider-Abettor Instruction Was Properly Omitted from the Charge	12

TABLE OF CASES

Commonwealth v. *Conlin*, 188 Mass. 265, 74 N. E. 351 (1905)	8
Crawford v. *United States*, 91 U. S. App. D. C. 234, 198 F. 2d 976 (1952)	8
Cusmano v. *United States*, 13 F. 2d 451 (6th Cir. 1926), *cert. denied*, 273 U. S. 773	8
Felton v. *United States*, 83 U. S. App. D. C. 277, 170 F. 2d 153 (1948), *cert. denied*, 335 U. S. 831	8
Grimes v. *United States*, 151 F. 2d 417 (5th Cir. 1945)	13
Howgate v. *United States*, 7 App. D. C. 217 (1895)	13
Hubby v. *United States*, 150 F. 2d 165 (5th Cir. 1945)	11
Hudson v. *United States*, 180 F. 2d 630 (4th Cir. 1950), *cert. denied*, 339 U. S. 981	13
Jackson v. *United States*, 94 U. S. App. D. C. 71, 214, F. 2d 240 (1954) *cert denied*, 74 S. Ct. 879	11
Johnson v. *United States*, 195 F. 2d 673 (8th Cir. 1952)	10
Meeks v. *United States*, 179 F. 2d 319 (9th Cir. 1950)	8
Morei v. *United States*, 127 F. 2d 827 (6th Cir. 1942)	11
Mullaney v. *United States*, 82 F. 2d 638 (9th Cir. 1936)	9, 13
Rosenberg v. *United States*, 13 F. 2d 369 (9th Cir. 1926)	9
Sawyer v. *United States*, 27 F. 2d 569 (9th Cir. 1928), *cert. denied*, 278 U. S. 650	13
Smith v. *United States*, 173 F. 2d 181 (9th Cir. 1949)	8
Spalitto v. *United States*, 39 F. 2d 782 (8th Cir. 1930)	13
State v. *Bishop*, 317 Mo. 477, 296 S. W. 147 (1927)	10
United States v. *Chiarella*, 184 F. 2d 903 (2d Cir. 1950)	8
United States v. *Cohen*, 124 F. 2d 164 (2d Cir. 1942), *cert. denied, sub. nom.*, *Bernstein* v. *United States*, 315 U. S. 811 (1942)	9
United States v. *DiRe*, 332 U. S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1948)	11
United States v. *Horton*, 180 F. 2d 427 (7th Cir. 1950)	13

Page

Walder v. *United States*, 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354 (1954) 8
Weldon v. *United States*, 87 U. S. App. D. C. 113, 183 F. 2d 832 (1950), *cert. denied*, 343 U. S. 967 13
Williams v. *United States*, 55 App. D. C. 239, 4 F. 2d 432 (1925) 9
Willsman v. *United States*, 286 Fed. 852 (8th Cir. 1923) 9
Willmering v. *United States*, 4 F. 2d 209 (5th Cir. 1925) 13

OTHER REFERENCES

26 U. S. C. §§ 4704a, 4705a 1
21 U. S. C. § 174 1
Rule 30, Federal Rules of Criminal Procedure 8, 12

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14080

CHARLES BERRY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On January 28, 1957, there was filed in the District Court a nine-count indictment charging that on August 29th and 31st, 1956, Charles H. Berry and Ernest E. Harding, jointly violated the narcotics laws, 26 U. S. C. §§ 4704a, 4705a, 21 U. S. C. § 174. Counts Four, Five and Six charged Harding, alone, with similar violations on August 30th, 1956 (J. A. 1–3). The jury found Berry guilty of the August 31st transaction as charged in counts 7, 8, and 9 (J. A. 4, 46). A judgment filed June 21, 1957, imposed a general sentence of five years imprisonment on Berry (J. A. 5). This appeal was timely noted [1] (J. A. 6).

On August 29th (two days prior to the transaction involved in this appeal) Joseph Levine came from Baltimore, Maryland to the District of Columbia with three persons: Fat Man, Bob and Dicky (J. A. 7, 15). Levine did not then know either

[1] His motion to appeal in forma pauperis was filed in the District Court on June 29, 1957.

appellant or Harding—appellant's codefendant in the trial (J. A. 13, 14). At approximately ten p. m. on the corner of 11th and P Streets, near the "Sugar Bowl Cafe," Fat Man introduced him to appellant saying that Levine "is my man. He is all right" (J. A. 14, 15). Appellant was asked where was Harding. Appellant responded "he didn't know at the present time, but he [sic] pretty sure * * * [Harding] would show sometime during that night." Harding did appear in front of the Sugar Bowl some two hours later (J. A. 8). Jointly, appellant and Harding came to Levine, and got into Levine's automobile. In the presence of appellant, Levine arranged a "sample" purchase of one capsule of heroin for $2.50. Levine drove on 11th Street, as directed, to a place between Euclid and Clifton, "where Harding told * * * [appellant] to get him one thing, meaning one capsule of heroin" (J. A. 9). Harding stayed with Levine in the automobile. Appellant left the automobile, and returned in 10 minutes with one capsule of heroin, which he gave to Harding. Harding then sold the capsule to Levine for the arranged price (J. A. 10).

Two days later, on August 31st, Levine was again in the Sugar Bowl Cafe. Appellant and Harding were also in the Cafe. They were together. Appellant remained alongside Harding when Levine stated that this time he wanted to make a bigger buy, and inquired if he could make such purchase at a lower price. Harding responded the price could perhaps be lower the next time, but not this time. Levine requested thirty capsules. Appellant, Harding and Levine got into Levine's automobile. Levine drove, as directed, to 12th and T Streets (J. A. 11–12).

Levine described the events transpiring at this location, as follows (J. A. 12):

> "* * * Harding and * * * [appellant] start out of the car. I told them that I didn't want to sit there by myself. [Appellant] * * * remained in the car with me while Harding went around the corner out of my sight"

Approximately ten to fifteen minutes later, Harding returned with the heroin (J. A. 22) and gave the thirty capsules to

Levine in return for $45.00. Levine drove further—to a place where appellant and Harding together left the automobile (J. A. 12, 16, 18–19).

During the cross-examination by appellant's trial counsel of Levine, appellant's trial counsel asked and was answered the following question (J. A. 15):

> "Q. Now, listen to me carefully, and I want just a yes or no to the question I am going to ask you. Did any of those three, that is, Fat Man, Bob and Dicky, at any time, in your presence, on the evening of the 29th, make a purchase of any capsules filled with little white powder?
>
> "A. Yes, ma'am."

On redirect examination of this same witness by the prosecutor, the following transpired (J. A. 17):

> "Q. And you were asked a question by my friend as to whether or not any of those men, I believe, made a purchase of narcotics; is that right?
>
> "Mrs. DWYER. No, sir. Just a moment, please, Your Honor. I object to that. That was not my question.
>
> "Mr. MCLAUGHLIN. Your question was, was there a sale of narcotics made at that time.
>
> "Mrs. DWYER. I object.
>
> "Mr. MCLAUGHLIN. Isn't that question the question——
>
> "Mrs. DWYER. No; I asked if a capsule of white powder——
>
> "Mr. MCLAUGHLIN. No, no; you didn't ask that.
>
> "Mrs. DWYER. May we have the record checked?
>
> "Mr. MCLAUGHLIN. I think we can save time. I used the wrong word.
>
> "By Mr. MCLAUGHLIN:
>
> "Q. I believe you were asked the question by my friend as to on August 29, when you were in the presence of the Defendant Berry and these other men that you came from Baltimore with, whether anyone made a purchase of any capsules.
>
> "A. Yes, sir.

"Q. Who made the purchase of capsules at that time?
"A. Fat Man and Dickey.
"Q. Who did he [sic] make the purchase from?
"A. Berry?"

Appellant's counsel was silent; no request was made for a mistrial or instruction of any kind.

At the close of the Government's case, appellant's trial counsel moved for a judgment of acquittal specifically as to the three counts on which the jury subsequently found guilt (Counts Seven, Eight and Nine), stating (J. A. 23):

> "* * * [appellant] did not participate in any way in assisting Harding in acquiring or delivering these drugs; nor is there any evidence—"

The court indicated this motion, in light of the evidence, did not justify an acquittal on those counts; but "may call for an instruction on aiding and abetting" (J. A. 23). Appellant's trial counsel responded (J. A. 23):

> "Well, I would just like to say this to the Court: There is certainly no evidence that he assisted or aided in any wise in that transaction."

Government counsel argued that aside from aider and abettor there was sufficient evidence appellant was a joint principal, and "agreed" to submission of the case for the jury's consideration on that ground alone. By silence, appellant's counsel indicated agreement with the court's decision, thereupon made, not to give an aider and abettor instruction (J. A. 24–25).

Appellant testified he had known Harding since each was 10 years of age. At the times charged in the indictment both were addicted to narcotics; appellant had no employment or source of regular income; but knew where the Sugar Bowl Cafe was located, and had a source of supply in Washington for narcotics. He stated he had never seen Levine prior to the trial, and was, himself, in Baltimore on August 31st—the date charged in the indictment. However, he also testified that for some period of time prior to September 5th he suffered withdrawal pains. He variously estimated this antecedent time interval as three days' duration, and also as some two weeks' duration. On September 5th he entered a

hospital here in Washington, D. C., for treatment of the pains (J. A. 25–29).

At the conclusion of the evidence and preparatory to submission to the jury, appellant's counsel did not request an aider-abettor instruction, nor any other instruction. The court instructed, in, and apart from, the language of the applicable statutes, the jury could convict "the said defendant so found by you, the Jury, to have had possession," on the basis of their finding beyond a reasonable doubt of that possession of the drugs—unexplained to the jury's satisfaction (J. A. 39, 37–39). The jury was instructed on alibi (J. A. 44). The testimony of Levine was to be "viewed with suspicion and received with caution." The testimony of the police officers was to be searched for coloration resulting from any discrediting interest (J. A. 41). The jury was charged to adopt the evidence, theory or conclusion most favorable to the appellant if alternatives were found to exist (J. A. 42). Words or acts solely those of one defendant, as shown by the evidence, were not to be treated as evidence against the other defendant (J. A. 44). No point or portion of the instruction was to be singled out in disregard of other portions of the court's charge; rather, each such portion was to be considered in the light of all other such portions (J. A. 44–45). Appellant's trial counsel stated specifically there was no objection to the court's charge (J. A. 46). This appeal followed.

STATUTES INVOLVED

Same; penalty; evidence.

Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilities the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of

454420—58——2

> the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

26 U. S. C. § 4704 (a) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and in the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U. S. C. § 4705 (a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

Under the circumstances showing appellants proximity, and a connection with the instant case, appellant's counsel "opened the door" to identification of appellant as the vendor

in a narcotics offense not charged in the indictment. The case was tried on the partnership theory. The prior transactions, and repeated acts of appellant demonstrate the codefendant's possession of narcotics during the August 31st transaction was possession in partnership with appellant. The aider-abettor instruction was properly omitted from the court's charge, on request of appellant. In other respects also, the instructions were adequate and proper.

ARGUMENT

I

The evidence of another offense was elicited by appellant's trial counsel

On cross-examination of the witness Levine, appellant's own trial counsel asked (J. A. 15):

> "Q. Now listen to me carefully, and I want just a yes or no to the question I am going to ask you. Did any of those three, that is, Fat man, Bob and Dicky, at any time, in your presence, on the evening of the 29th, make a purchase of any capsules filled with little white powder?"

In the fashion requested by counsel, the witness responded "yes" (J. A. 15). As shown by prior testimony, the circumstances hypothesized in appellant's question were substantially limited to the area near the Sugar Bowl Cafe and to events occurring in appellant's presence (J. A. 15). The date and events were relevant to the first three counts of the indictment. On redirect the prosecutor asked (J. A. 17):

> "Q. Who made the purchase of capsules at that time?
> "A. Fat Man and Dicky.
> "Q. Who did he [sic] make the purchase from?
> "A. Berry."

There was no objection to the questions, nor request for mistrial, nor for curative instructions to the jury.

Appellant complains in this appeal on the inconsistent grounds that the jury thus heard evidence of another offense, and also because the other offense was "only of a very specu-

lative nature" (Br. pp. 5, 6). He cannot complain on appeal—as he made no effort in the trial court to correct the situation. Rule 30, Federal Rules of Criminal Procedure.

In any event, the situation was of his own, calculated, creation. He opened the door. The amplification by the prosecution was proper. There is no error. *Crawford* v. *United States,* 91 U. S. App. D. C. 234, 236, 198 F. 2d 976 (1952), and cases cited therein. See also, *Walder* v. *United States,* 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354 (1954); *Felton* v. *United States,* 83 U. S. App. D. C. 277, 170 F. 2d 153, 155 (1948), *cert. denied,* 335 U. S. 831; *United States* v. *Chiarella,* 184 F. 2d 903 (2d Cir. 1950); *Meeks* v. *United States,* 179 F. 2d 319 (9th Cir. 1950); *Smith* v. *United States,* 173 F. 2d 181 (9th Cir. 1949); *Cusmano* v. *United States,* 13 F. 2d 451 (6th Cir. 1926), *cert. denied,* 273 U. S. 773. This evidence being relevant and probative, may, properly, afford support for the jury's verdict. *Crawford* v. *United States, supra.*

II

The record clearly demonstrates appellant's constructive possession of narcotics, and partnership in its sale

Appellant complains that the record shows only the "mere presence" of appellant in connection with the August 31st transaction. From this, he concludes the evidence is insufficient to support the judgment. (Br. pp. 6–11.) Actually, the record affords ample support for finding that appellant was in constructive possession of the narcotics sold on August 31st.

Constructive possession in a criminal case has been defined "as follows: 'It would be proved by evidence that the implements were held by one for himself and as agent for another; that they were jointly bought and owned, but kept by one only, or procured and held one by mutual agreement or at the request of another; or that they were deposited in some place mutually agreed on, to which either could resort at pleasure.' " *Commonwealth* v. *Conlin,* 188 Mass. 265, 74 N. E. 351, 352 (1905).

In line with this descriptive definition, *Willsman* v. *United States,* 286 Fed. 852, 856 (8th Cir. 1923), states:

> "In reason it seems that the actual possession of Grant was the possession of plaintiff in error, if Grant was in fact only his servant in the delivery of the drugs to Anderson. And in reason it seems that the actual possession of Grant was the possession of plaintiff in error, if they were partners or confederates in the business of purchasing narcotic drugs in or from unstamped packages and selling them in violation of law, and the package delivered to Anderson was obtained from a place in their joint possession or under their joint control. In such case the possession of the drugs by Grant when delivered to Anderson would be a mere fortuitous circumstance, and we are convinced the spirit of the act of Congress making possession prima facie evidence would require us to hold that the possession of Grant under such circumstances would be the possession of the plaintiff in error."

In *Mullaney* v. *United States*, 82 F. 2d 638, 642 (9th Cir. 1936), the court instructed that possession means " 'having in one's control or under one's dominion' ". Accord, *Williams* v. *United States*, 55 App. D. C. 239, 4 F. 2d 432, 435 (1925); *Willsman* v. *United States, supra.*

Although possession by the principal offender alone may support an aider and abettor's conviction under the narcotic laws,[2] it is more typical that accessories be shown to have been constructively or jointly possessed of the narcotics.[3] In the instant case much the same circumstances evidenced at once appellant's possession as well as the requisite joint crim-

---

[2] *United States* v. *Cohen*, 124 F. 2d 164 (2d Cir. 1942), *cert. denied sub. nom., Bernstein* v. *United States*, 315 U. S. 811 (1942).

[3] *E. g., Williams* v. *United States*, 55 App. D. C. 239, 4 F. 2d 432, 435 (1925) (circumstances showed drugs "under the control and in the possession of Williams" although actual sale was made by companion); *Rosenberg* v. *United States*, 13 F. 2d 369, 370 (9th Cir. 1926) (although one defendant denied and the other admitted possession of drugs in the former's room, evidence was sufficient to show "both defendants had possession").

inal intent.[4] Intent is ordinarily derived from circumstances indicating such facts as motive and knowledge.[5]

Appellant, himself, sold capsules near the Sugar Bowl Cafe on August 29th (J. A. 15, 17; see Argument I, *supra*). He knew, from the circumstances of the introduction, that Levine desired to purchase narcotics from Harding; and, correctly prophecied Harding's arrival. Even though he knew narcotics would be sold, he joined with Harding in the actual negotiations for the August 29th sale. He took the subsequent automobile ride. Appellant left the automobile and personally obtained the goods subsequently sold as narcotics. Harding waited in the automobile with Levine, on this occasion (J. A. 7–10).

Two days later, on August 31st, appellant and Harding were again in immediate association, and, as before, at the Sugar Bowl Cafe. Again appellant maintained his presence during the negotiations between Levine and Harding for narcotics. He, thereafter, activated his presence by going with Levine and Harding in the automobile. Finally, he further indicated his interest by starting to move out of the automobile when time came to perform the critical and essential step of physically obtaining the narcotics from the source (J. A. 11–12).

From this record the jury was entitled to infer that appellant and Harding were partners in the sale of narcotics. There was repeated evidence of their close association, even when sales of narcotics were discussed. The Cafe was their place of contact. It appears the source of supply was, geographically, similar on both the August 29th and 31st transactions. Appellant made contact with that source of supply on August

---

[4] To justify finding a defendant "guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." *Johnson* v. *United States*, 195 F. 2d 673, 675 (8th Cir. 1952); 62 Stat. 684 (1948), as amended, 18 U. S. C. § 2 (Supp. 1952); 31 Stat. 1337 (1901), 22 D. C. Code § 105 (1951).

[5] For example, "'presence, companionship, and conduct before and after the offense are circumstances for which one's participation in the criminal intent may be inferred.'" *State* v. *Bishop*, 317 Mo. 447, 296 S. W. 147, 149 (1927).

29th, and evidenced his willingness to do so again on August 31st. It is a legitimate inference that on August 31st it was just a fortuitous circumstance which caused the narcotics to be in the hands of Harding rather than appellant; and, that the possession of Harding was a possession in which appellant had an interest. See *Jackson* v. *United States,* 94 U. S. App. D. C. 71, 214 F. 2d 240 (1954), *cert. denied* 74 S. Ct. 879.

Appellant's reliance on *United States* v. *DiRe,* 332 U. S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1948), and *Morei* v. *United States,* 127 F. 2d 827 (6th Cir. 1942), is misplaced. Morei was shown only to have directed the informant as to the whereabouts of the vendor of narcotics; and was not shown to have himself engaged in transactions in narcotics, associated with the vendor, or to have in any way been present or acquainted with the transaction charged. The facts are completely different from the instant case. The law as quoted by appellant from the *Morei* case, *i. e.,* "community of scheme," "concert of action," and "purposive association" (Br. pp. 8–9) demonstrates the sufficiency of the record in the instant case. The Supreme Court stated in *DiRe,* 332 U. S. 581, 593:

> "* * * The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal."

This statement strengthens the significance of the facts in the instant case that all meetings and transactions on August 29th and 31st were secretively conducted in the night time. Both cases cited by appellant actually demonstrate the invalidity of his position.[6]

---

[6] Appellant also relies on *Hubby* v. *United States,* 150 F. 2d 165 (5th Cir. 1945) (Br. pp. 9–10). Factually, it involves a mere introduction, as in *Morei, supra,* and other events transpiring some month and a half after the introduction. In any event, whether the fact of a prior sale, as a sale, be considered, the facts surrounding prior associations may, properly, be considered in so far as such facts are probative of a state of mind pertinent to constructive possession.

In the light of the evidence, direct and circumstantial, there is no substance to appellant's contention that the Government failed to prove possession of narcotic drugs.

III

The aider-abettor instruction was properly omitted from the charge

Appellant argues (Br. p. 11):

> "Yet, though appellant was charged as principal, the evidence can only sustain his conviction as principal if in fact he was guilty of aiding and abetting the commission of the offense. Thus aiding and abetting become essential elements of the crime insofar as appellant is concerned."

Thereafter, he complains of the "failure of the court to define the elements of aiding and abetting" (Br. p. 12). Logically, legally, and equitably his complaint is not legitimate.

As demonstrated by Argument II, *supra*, the facts logically and legally demonstrate appellant's partnership with Harding in the sale of narcotics and the propriety of his trial as principal rather than aider and abettor.

He announced satisfaction with the court's charge (J. A. 46) and may not properly complain of the omission of the aider and abettor instruction. Rule 30, Federal Rules of Criminal Procedure.

Of most significance is the fact appellant's own counsel actively caused omission of the aider and abettor instruction. She argued the testimony did not show actual possession by appellant. The court suggested the propriety of an aider and abettor instruction. Counsel retaliated (J. A. 23):

> "Well, I would just like to say this to the Court: That there is certainly no evidence that he assisted or aided in any wise in that transaction."

This statement was taken to be an objection to such an instruction, and thereafter respected as such. In this colloquy it was also recognized the absence of such an instruction put the heavier burden of showing a purposeful partnership between

appellant and Harding on the prosecution, a situation favorable to appellant. Appellant's counsel maintained a silence appropriate to this favorable position; and though adequate time for a change of thought thereafter transpired, actually counsel thereafter expressed satisfaction with the court's charge omitting an aider and abettor instruction. Appellant is estopped from now asserting the charge was inadequate in this respect.[7] *Hudson* v. *United States,* 180 F. 2d 630 (4th Cir. 1950), *cert. denied,* 339 U. S. 981. See also *Howgate* v. *United States,* 7 App. D. C. 217 (1895); *Weldon* v. *United States,* 87 U. S. App. D. C. 113, 183 F. 2d 832, 835 (1950), *cert. denied,* 343 U. S. 967.

Appellant's defense was alibi. The court charged, *inter alia* (J. A. 44):

> "The Defendant Berry in this case has denied that he committed the offenses with which he is charged and in connection with this denial has asserted the defense of an alibi.
>
> "The defense of an alibi, if established, is a legal and proper and valid defense. The word 'alibi' is a Latin word, meaning 'elsewhere.' And the defense of an alibi, as the word indicates, is that the Defendant was elsewhere than at the scene of the alleged offenses at the time that it is charged they were committed.
>
> "If, after a consideration of all the evidence, you have a reasonable doubt that the Defendant Berry was present at the time of the alleged offenses, your verdict should be, not guilty, as to said defendant Berry."

He does not complain the statement is incorrect or inappropriate. He says the instruction allows the inference the jury was told it could find *guilt* if it found Berry to have been present, without more (Br. p. 11). Obviously, this statement only told the jury how it might find "Not Guilty"; and expressed nothing regarding how the jury could formulate a verdict of

[7] The aider and abettor charge is not essential. *United States* v. *Horton,* 180 F. 2d 427 (7th Cir. 1950); *Grimes* v. *United States,* 151 F. 2d 417 (5th Cir. 1945); *Mullaney* v. *United States,* 82 F. 2d 638 (9th Cir. 1936); *Spalitto* v. *United States,* 39 F. 2d 782 (8th Cir. 1930); *Sawyer* v. *United States,* 27 F. 2d 569 (9th Cir. 1928), *cert. denied,* 278 U. S. 650; *Willmering* v. *United States,* 4 F. 2d 209 (5th Cir. 1925).

"Guilty". The requirements for a "guilty" verdict were contained elsewhere in the charge (J. A. 37–39). In the time necessary to read the some fifteen lines after the above-quoted instruction the jury was told it must consider each portion of the charge only in the light of all other portions of the charge (J. A. 44–45). In the language of the applicable statutes, and apart from the statutes, the jury had previously been told that either of the defendants could be convicted only upon its finding that "the said defendant so found by you, the jury * * * had possession" (J. A. 39). The instructions did not permit a finding of guilt on mere presence alone. In other respects also, the instructions fully protected the rights of appellant.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.
LEWIS CARROLL,
ARTHUR J. MCLAUGHLIN,
CARL W. BELCHER,
Assistant United States Attorneys.

U. S. GOVERNMENT PRINTING OFFICE: 1950